Omahaline Hydraulics Co., a Division of Prince Manufacturing Corporation, Petitioner *and* International Association of Machinists and Aerospace Workers, AFL–CIO. Case 18–RM–1355

October 15, 2003

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held March 28, 2002, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 0 votes cast for and 21 votes cast against the Union, with 35 challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, and has adopted the hearing officer's findings[1] and recommendations.[2]

The Employer excepts to the hearing officer's recommendation to open and count the challenged ballots of employees who had been on strike since May 3, 2001. The hearing officer found that the strikers were still employees at the time of the election, and accordingly recommended that the challenges to their ballots be overruled. We agree with the hearing officer.

On July 20, 2000, the Union was certified to represent the Employer's unit employees at its North Sioux City, South Dakota facility. The unit consisted of about 70 employees. The Employer manufactured cylinders, pumps, and motors at that time. The parties commenced negotiations in September 2000 and, although they had more than 50 meetings, they did not reach agreement.

Because of a decline in cylinder orders and the loss of a major customer, the Employer planned a reduction-in-force for February 2001.[3] In early February, the Employer notified the Union that it planned to reduce its work force by 13 employees, and began conducting small group meetings with its employees to inform them of the planned reduction-in-force.[4] The 13 employees considered least qualified by the Employer were selected for the reduction-in-force, and were given two letters dated February 23. One letter, signed by Human Resources Director Roberta Piper, informed the affected employees of their insurance options, vacation settlements, 401(k) availability, and that their final paycheck would be dated and mailed on March 1. The second letter, signed by General Manager Lynn Dumas, informed these employees that the reduction-in-force was a result of the loss of a major customer, that the Employer was working to regain the lost business, and that "[w]e will keep you informed." All 13 of the employees selected for separation in February 2001 were provided a final paycheck that included the wage equivalent of any accrued and unused vacation time.[5]

About May 1, the Employer notified the Union that it was planning a second reduction-in-force of approximately 20 employees. After meetings on May 2 and 3 to negotiate the terms of the second reduction-in-force, the Union commenced a strike on May 3. About two-thirds of the Respondent's existing work force went on strike.

In June, the Employer notified the Union that it decided to implement a change in the "scope and direction" of its business. Due to space limitations, the Employer decided to focus on the production of pumps and motors and to eliminate cylinder production at its North Sioux City facility. The Employer advised the Union that its cylinder business would be permanently transferred to other facilities with excess cylinder capacity. The Union filed an unfair labor practice charge over this matter, alleging that the Employer violated Section 8(a)(5) and (1) of the Act. That charge was investigated and dismissed (Case 18–CA–16111–1).[6]

In July, the Employer transferred the cylinder manufacturing equipment from the North Sioux City facility to

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In addition, the Employer's exceptions implicitly contend that the hearing officer's findings and conclusions demonstrate bias. On careful examination of the hearing officer's report and the entire record, we are satisfied that the Employer's contentions are without merit.

[2] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to sustain the challenges to the ballots of the employees who were separated in February 2001 (Craig Culbertson, Brad Frazee, Cavanall Hoover, Steve Jensen, Ken Krumwiede, Tim Tomlinson, Kelly Weltz, and Dennis Wynn).

[3] All dates are in 2001 unless noted otherwise.

[4] We correct the hearing officer's inadvertent reference to "14" employees who were included on the February 2001 reduction-in-force.

[5] The challenges to the ballots of these 13 employees were sustained, and there are no exceptions to this matter.

[6] On October 30, the Regional Director found insufficient evidence to establish that the Employer had violated the Act. The Regional Director found that "the evidence established that the Employer's decision to transfer all its cylinder production was a change in the nature and scope of its business and was not a mandatory subject of bargaining."

its two other facilities and began focusing, at North Sioux City, exclusively on the production of pumps and motors. In addition, by purchasing modern machinery dedicated exclusively to the production of pumps and motors, by cross-training its employees, and by concentrating on filling pending orders rather than building inventory for potential sales, the Employer increased productivity levels so as to be able to perform all of the work with the nonstriking employees.

In October, the Union requested that the Employer provide wage information concerning its employees. The Employer's response included wage information for the striking employees. The Employer refused, however, to provide the wage information for the employees separated in the February 2001 reduction-in-force, taking the position that it had no obligation to provide information for these employees because the Employer considered them to be permanently terminated.

In early February 2002, an employee filed a decertification petition (Case 18–RD–2397). In preparation for the hearing on that petition, the Employer took the position that both the employees separated in the February 2001 reduction-in-force and the strikers were not eligible to vote in the election. Thereafter, on February 27, 2002, the Employer sent the Union a letter stating the following:

> In the judgment of the Company, the June 2001 decision to discontinue cylinder production at the Company's facility had the effect of permanently eliminating the jobs of the February 2001 RIF's and the strikers. [I]t is the further position of the Company that neither the February 2001 RIF's or the strikers have any reasonable expectation of future employment with the Company beyond the strike's end, indeed for all foreseeable time . . . . [I]t seems logical to consider their employment status as terminated and engage in affects bargaining [sic].

The parties met on March 6 and 7, 2002. At these meetings, the Union asked about the status of the strikers, and the Employer responded by referring to its February 27 letter. The Union then requested that the striking employees be paid any accrued and unused vacation pay. The Employer responded that they would not be paid until the Union agreed to a termination date for the strikers. The Employer proposed a termination date of July 3, 2001.[7] The Union refused to agree to that termination date, and neither party proposed an alternative date. The Union then requested that the Employer send a letter directly to each striking employee informing them of their status. The Employer refused.

On March 25, 2002, the Employer sent the Union another letter, repeating its position that neither the terminated employees of February 2001 nor the striking employees have "any reasonable expectation of future employment with the Company at the strike's end. . . . Therefore, it seemed logical to consider their employment status as terminated." The parties met again on March 28, 2002, the day of the election, and the Employer insisted that it wanted the Union to agree to a termination date before it would consider paying any vacation pay to the striking employees.

Based on the foregoing facts, we agree with the hearing officer that the striking employees were eligible to vote and that their ballots should be opened and counted. The Board has long held that economic strikers retain their eligibility to vote in an election absent some affirmative action that brings their eligibility to an end. *W. Wilton Wood, Inc.*, 127 NLRB 1675, 1677 (1960). Further, the burden is on the employer to prove that their jobs have been permanently eliminated. *Lamb-Grays Harbor Co.*, 295 NLRB 355, 357 (1989). That burden was not met here.

From the commencement of the strike in May 2001, through the time of the election, the strikers continued to be employees of the Employer; at no time during this period were their jobs in fact eliminated. This is shown by several facts. First, although the Employer had transferred its cylinder production equipment in July, it continued to regard the strikers as its employees. Thus, when the Employer responded to the Union's October request for wage information, it provided information on both its working and striking employees. Conversely, the Employer expressly declined to provide information on the employees separated in February 2001, asserting that those 13 employees had been permanently terminated. In so doing, the Employer clearly differentiated between the strikers' status and those whose employment it had terminated. Indeed, the Employer made no statement even questioning the strikers' status as its employees until a decertification petition was filed several months later in February 2002.

Second, until the time of the election, the Employer never sent the strikers a notice of termination, or any insurance and 401(k) information, as it did to the employees terminated in February 2001. Rather, the Employer merely proposed to the Union that they mutually agree to consider the strikers terminated, and that they further agree to a termination date.

Third, when the Union requested that the Employer inform the strikers of their status, the Employer refused.

[7] July 3, 2001, is the date the Employer began removing the cylinder production machinery from its North Sioux City facility.

Accordingly, in the absence of any affirmative action by the Employer to effectuate their termination, as compared with the Employers' clear steps to terminate those employees it laid off just a few months earlier in February 2001, we find that the Employer failed to meet its burden of establishing that the striking employees were not eligible to vote.

We find this case distinguishable from *Lamb-Grays Harbor Co.*, supra. There, the Board found that certain striking employees were ineligible to vote because their positions had been eliminated for valid economic reasons. In *Lamb-Grays*, the employer discontinued manufacturing operations at one of its facilities during a strike, informed the union that certain of the striking employees would not continue to be employed, and stated that these employees "should consider themselves terminated." 295 NLRB 355, 356. In sustaining the challenges to the strikers' ballots, the Board stated that the employer had the "burden of showing that the jobs were in fact permanently eliminated," and found that the employer had met its burden. Id. at 357.

Unlike the employer in *Lamb-Grays*, the Employer here has failed to meet its burden. The Employer did not inform the Union or the strikers of a decision to terminate; it merely made a *proposal* to the Union that they *agree* that the strikers should be considered terminated, a proposal that was not accepted by the Union. Further, when pressed by the Union to inform the strikers of their status, the Employer refused to do so. Indeed, from early on, the Employer treated these strikers differently from the employees it had terminated in February 2001, as evidenced by the fact that it complied with the Union's request to provide wage information about them in October 2001. Thus, up through the date of the election in March 2002, the Employer was bargaining with the Union over their terms and conditions of employment. In view of this conduct, we are unable to find that the Employer here has, like the employer in *Lamb-Grays*, met its burden of showing that the strikers' jobs were *in fact* permanently eliminated.

Our dissenting colleague would sustain the challenges to the strikers' ballots. He contends that they are ineligible because they had no reasonable expectation of recall. Our colleague has applied the wrong legal standard. Under well-settled precedent, the burden was clearly on the Employer to show that the strikers' jobs were "permanently eliminated." *Lamb-Grays*, supra. See also *Erman Corp.*, 330 NLRB 95 (1999) ("Before disenfranchising employees who might otherwise be eligible to vote, the employer's burden is to show that their jobs were *permanently* eliminated."). As noted, the Employer has failed to meet this burden.[8]

Indeed, the Employer has specifically and repeatedly refused to terminate the strikers (and to pay them accrued vacation), instead unsuccessfully proposing that the Union agree to a specified termination date. Although the Employer apparently wants to have it both ways—refuse to terminate the strikers, yet make them ineligible[9]—the fact remains that the strikers have not yet been terminated, the Employer is continuing to bargain with the Union over the timing and terms of their termination, and they remain unit employees, represented by the Union and with an interest in the outcome of the election. In the face of all this, the superficial logic of the dissent's view (since the strikers apparently are not coming back, they should not be eligible to vote) disappears. Although our colleague disputes this characterization of his analysis, his emphasis that an employee's voting eligibility be solely determined by whether the employee will be remaining in the bargaining unit in the future is in direct conflict with precedent. See *Amoco Oil Corp.*, 289 NLRB 280 (1988) (employee who had announced his retirement and had then taken vacation leave for the remaining period prior to his retirement was eligible to vote in an election which occurred before the effective date of his resignation).

Accordingly, we adopt the hearing officer's finding that the strikers' jobs had not been permanently eliminated, and his recommendation that the challenges to their ballots should be overruled.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 18 shall, within 14 days from this decision, open and count the ballots of John Carpenter, Wade Capron, Scott Frazee, Bruce Gilbertson, Chance Hall, Roger Hummel,

[8] Our dissenting colleague contends that his finding that the strikers did not have a reasonable expectation of recall is supported by *W. Wilton Wood*, supra. He argues that, consistent with *W. Wilton Wood*, the Employer here took some affirmative action to bring the strikers' eligibility "to an end" when it wrote its February 27 and March 28 letters to the Union. As set forth above, however, those letters were merely unaccepted proposals to the Union that the Union should agree that the strikers should be considered terminated, and we find, in light of the surrounding circumstances, that they do not show that the strikers had in fact been discharged or that their jobs had been permanently eliminated. Therefore, under *W. Wilton Wood*, the Employer's letters were insufficient to bring the strikers' voter eligibility "to an end." Accordingly, we find that they remain eligible to vote.

[9] Perhaps the Employer wants to wait out the union election: if the union is defeated, it might terminate the strikers unilaterally and seek to avoid bargaining over that decision or its effects. But see *Government Employees Local 888 (Bayley-Seton Hospital)*, 323 NLRB 717, 720 (1997) (employer remains obligated to bargain with the union replaced by a rival about "unfinished business").

Bob Jensen, Toni Loker, Lake Larson, David Linn, Chris Mace, Scott Malm, Drake Malm, Paul Mortweet, Ryan Nelson, Steve Parent, Mark Pauley, Jeremiah Reese, Allen Rohan, Terry Rosenbaum, Ben Schrunk, Ron Sherrill, Mark Sorensen, Shannon Sorensen, Kenny Swigart, Jesse Whittington, and Troy Wright. The Regional Director shall further prepare and cause to be served on the parties a revised tally of ballots, and issue the appropriate certification.

Dated, Washington, D.C. October 15, 2003

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting.

Contrary to my colleagues and the hearing officer, I would sustain the Employer's challenges to the ballots of the employees who went on strike on May 3, 2001. I find that the jobs of the strikers were eliminated and they had no reasonable expectation of recall. Therefore, they were not eligible voters in the election.

The facts are not in dispute. The Employer made a decision to discontinue the production of cylinders at its North Sioux City facility. The Employer also made a decision that it could perform the remaining work with fewer employees, i.e., the number of nonstriking employees. There is no allegation that either of the decisions was improperly motivated.

My colleagues have misperceived the issue. The issue is not whether the employees were terminated. The issue is whether they had a reasonable expectation of recall. The principle underlying this issue is the notion that employees who are not working in the unit and who cannot reasonably be expected to return to the unit in the future should not participate in the election to determine whether unit employees will be represented by a union.

Focusing on that correct statement of the issue, it is clear that these employees had no reasonable expectation of recall. To be sure, unlike the 13 employees laid off in February, the employees involved herein had not been terminated. That was because the Employer and the Union had not agreed on a termination date. But, the important fact is that they were not going to be recalled. The Employer made that clear in letters of February 27 and March 25. Indeed, even the Union was not contesting this fact. It simply wanted to assure that certain vacation benefits were paid to these employees and it wanted to secure a more advantageous termination date. My colleagues contend that these letters were mere proposals to the Union. The contention has no merit. The letters set forth *facts* which made it clear that there was no reasonable expectancy of recall. The *proposal* was that the Union agree to a termination date as a condition of receiving vacation pay.

My colleagues say that the Employer "refused to terminate" the employees. In fact, the parties were negotiating about a termination date. And, the fact that the Employer supplied information to the Union in October 2001 was part and parcel of those negotiations. Thus, this was simply a situation where a termination had not been agreed on. But, it was clear to all that these employees had no reasonable expectation of recall.

In sum, at the time of the election, there was no reasonable prospect for the recall of these employees. They were therefore ineligible to vote in that election.

Lamb-Grays Harbor Co., 295 NLRB 355 (1989), supports my view. The employer there took the position that jobs were eliminated, and proceeded to support that position. The Board held that the employees were ineligible to vote. Similarly, in the instant case, the Employer has eliminated the positions. It transferred cylinder manufacturing to North Sioux City. With respect to the production of pumps and motors, it purchased modern machinery and cross-trained employees. The results of these decisions were that the Employer no longer needed employees for cylinder manufacturing, and it could perform the remaining work with fewer employees. Accordingly, the employees whose jobs had been eliminated were ineligible to vote.

Further, even if the positions were not permanently eliminated, the fact remains that the employees herein did not have a reasonable expectancy of recall. The Employer twice told the Union that the employees had no reasonable expectation of recall. There is nothing to contradict that statement. Consistent with *W. Wilton Wood, Inc.*, 127 NLRB 1675, 1677 (1960), the Employer took affirmative action in the letters of February 27 and March 28 to notify the Union of the job elimination and to demonstrate that voting eligibility of the affected employees had come to an end.[1] Finally, my colleagues say that I have used "superficial logic." I believe that it is neither superficial nor illogical to say that an employee who has no reasonable expectancy of recall should not have a voice in selecting or rejecting a representative for the

[1] Although the Board in *Wood* listed job elimination as one of the ways in which a striker loses eligibility to vote, the Board made it clear that its listing was not an exhaustive one. Similarly, *Ermon Corp.*, 330 NLRB 95 (1999), says that "if the employee is otherwise eligible," the employer must show job elimination.

unit. That important decision is for the employees who remain and will be directly affected by it. My colleagues have erroneously asserted that my position is contrary to *Amoco Oil Corp.*, 289 NLRB 280 (1988). That case is clearly distinguishable because the employee at issue there was on vacation leave at the time of the election, and intended to stay on vacation until the effective date of his retirement. An employee who is on vacation is quite unlike an employee who is not working because there is no work for him to perform. The former employee has chosen to be absent, i.e., to receive the employee vacation benefit of being paid while being absent from work. If he occupies that status at the time of the election, he is eligible to vote. And, the fact that he will thereafter cease to be an employee does not destroy that eligibility. By contrast, the employees here were involuntarily not working because there was insufficient work for them to perform. They were not being paid for this absence. That was their status at the time of the election, and there was no reasonable prospect for their being reinstated.

Dated, Washington, D.C. October 15, 2003

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD